

EDWARD STEWART	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHWEST TANK SERVICE	)	DATE ISSUED:
	)	
and	)	
	)	
PACIFIC MARINE INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Gibbs, Douglas, Theiler & Drachler), Seattle, Washington, for claimant.

Thomas Owen McElmeel (McElmeel & Schultz), Seattle, Washington, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order (88-LHC-3672) of Administrative Law Judge Steven E. Halpern denying claimant's request that employer be held liable for services rendered by claimant's counsel on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). An award of an attorney's fee is discretionary and may only be set aside if shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a ship scaler for employer, injured his lower back during the course of his employment on October 11, 1984. Claimant has not returned to work since the date of this incident. Employer voluntarily paid claimant temporary total disability compensation, totalling \$12,374.45, through May 31, 1986. 33 U.S.C. §908(b). Between October 12, 1987, and March 11, 1988, employer's carrier sent three letters to claimant's counsel offering to settle claimant's claim for compensation under the Act. No settlement was reached, however, and a formal hearing was

subsequently held. In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from October 12, 1984, through September 30, 1986, based upon an average weekly wage of \$184.41 and a corresponding weekly compensation rate of \$122.94, and authorized a work- hardening program.

Claimant's counsel subsequently filed a fee petition with the administrative law judge, requesting a fee of \$8,545.50 and costs of \$2,351.45. Employer thereafter filed objections to the fee petition. In an Order dated April 6, 1990, the administrative law judge, after determining that claimant's counsel had obtained no additional compensation for claimant over that which had been originally offered by employer, declined to hold employer liable for the requested fee.

On appeal, claimant contends that the administrative law judge erred in failing to hold employer liable for his counsel's fee. Employer responds, urging affirmance of the administrative law judge's Order.

An attorney's fee can only be assessed against employer pursuant to Section 28 of the Act. 33 U.S.C. §928. Under Section 28(a), 33 U.S.C. §928(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee payable by employer. Under Section 28(b), 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee only if the claimant succeeds in obtaining greater compensation than that agreed to by employer. *See, e.g., Tait v. Ingalls v. Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). As employer in the instant case paid benefits voluntarily to claimant, the case is governed by Section 28(b) of the Act.

In the present case, the parties agree that employer's carrier submitted three letters to claimant's counsel between October 12, 1987, and March 11, 1988. The initial letter sent by employer's carrier to claimant's counsel, dated October 12, 1987, states, in pertinent part:

[p]lease be advised that I have reviewed the file on [claimant] and at this time would be amiable [sic] to offer him settlement in the amount of \$8,000.

I ask that you discuss this offer with [claimant] and let me know your response to this offer.

Letter dated October 12, 1987. Thereafter, in a letter from employer's carrier to claimant's counsel dated January 4, 1988, employer's carrier noted that it had "not yet received a response regarding our settlement offer" and requested that a response to the offer be made. *See* Letter dated January 4, 1988. Subsequently, on March 11, 1988, employer's carrier sent a third letter to claimant's counsel, stating that no response to its "offer of settlement" had been made, and requesting that claimant's counsel "review the matter with your client and offer us your opinion regarding the possibilities of settlement." *See* Letter dated March 11, 1988. After noting these letters, the administrative law judge concluded that claimant's counsel had obtained no additional compensation for claimant over that offered by employer. In rendering this finding, the administrative law judge noted that although

claimant was awarded \$12,727.69 following the formal hearing, claimant had received \$12,374.45 in voluntary payments of compensation prior to May 31, 1986, employer had offered \$8,000 in settlement between October 12, 1987, and March 11, 1988, and claimant had previously been offered a work-hardening program by employer.

We agree with the administrative law judge's finding that claimant did not obtain "additional compensation" under Section 28(b) of the Act. Initially, the three letters sent by employer's carrier to claimant's counsel between October 12, 1987, and March 11, 1988, constitute a tender of compensation as required by Section 28(b) of the Act. A "tender," in light of the purpose of Section 28 to encourage voluntary payments, means a readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make such a payment to the claimant. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). An employer's valid offer to settle a claim may constitute a "tender of compensation" pursuant to Section 28(b). *See Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). Section 28(b) explicitly requires that a "tender" be made "in writing;" thus, a valid "offer to settle" may constitute a "tender" if it is made to the claimant in writing. *See Kaczmarek v. I.T.O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990). As the letters relied upon by the administrative law judge indicate a readiness, willingness and ability to make payment in the amount of \$8,000 to claimant in settlement of his claim, we hold that the administrative law judge committed no error in utilizing that amount in addressing employer's potential liability for claimant's counsel's fee. As the amount offered to claimant by employer's carrier, \$8,000, is clearly more than the amount of compensation additionally awarded to claimant,<sup>1</sup> we affirm the administrative law judge's determination that claimant's counsel did not succeed in obtaining additional compensation for claimant over that offered by employer, and his consequent decision not to hold employer liable for claimant's counsel's fee.<sup>2</sup> *See Armor*, 19 BRBS at 122; 33 U.S.C. § 928(b).

Accordingly, the Order of the administrative law judge declining to hold employer liable for claimant's attorney's fee is affirmed.

SO ORDERED.

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<sup>1</sup>Employer voluntarily paid claimant \$12,374.45 in compensation through May 31, 1986. Following the formal hearing, the administrative law judge awarded claimant compensation in the amount of \$12,727.69. While the administrative law judge also awarded a work-hardening program, he found employer had made this program available to claimant on three occasions. Order at 1.

<sup>2</sup>We reject claimant's assertion that the ultimate value of his award must be increased by the possibility of future medical benefits. In the instant case, there is no basis for speculating as to additional future benefits, especially in light of the absence of such an award in the administrative law judge's Decision and Order.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge